No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

*Petitioners*,

*v.*

STATE OF INDIANA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

# AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER


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## TABLE OF CITED AUTHORITIES

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**Cases**

*Atkins v. Virginia*,
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*Austin v. United States*,
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*Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,
492 U.S. 257 (1989) ..... 17, 18, 23

*Cantwell v. State of Connecticut*,
310 U.S. 296 (1940) ..... 15-16

*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,
532 U.S. 424 (2001) ..... 2

*Ewing v. California*,
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*Garcia v. Wyoming*,
587 F. App'x 464 (10th Cir. 2014) ..... 20

*Harmelin v. Michigan*,
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*Ingraham v. Wright*,
430 U.S. 651 (1977) ..... 17

*In re Kemmler*,
136 U.S. 436 (1890) ..... 22

**TABLE OF CITED AUTHORITIES**
**(continued)**

**Page(s)**

*Klopfer v. State of North Carolina.*,
386 U.S. 213 (1967) ..... 19

*Levine v. United States*,
362 U.S. 610 (1960) ..... 21

*McDonald v. City of Chicago, Illinois*,
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*Miller v. Alabama*,
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*Reyes v. North Texas Tollway Authority*,
830 F. Supp. 2d 194 (N.D. Tex. 2011) ..... 21

*Robinson v. California*,
370 U.S. 660 (1962) ..... 2

*Roper v. Simmons*,
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*Russello v. United States*,
464 U.S. 16 (1983) ..... 5

*Schilb v. Kuebel*,
404 U.S. 357 (1971) ..... 2

*Solem v. Helm*,
463 U.S. 277 (1983) ..... 19, 23

## TABLE OF CITED AUTHORITIES
(continued)

Page(s)

*State v. Timbs*,
84 N.E.3d 1179 (Ind. 2017) ..... 15

*United States v. Bajakajian*,
524 U.S. 321 (1998) ..... 1, 22

*West Virginia State Board of Education v. Barnette*,
319 U.S. 624 (1943) ..... 24

*Weems v. United States*,
217 U.S. 349 (1910) ..... 16

***U.S. Constition***

U.S. Const. amend. VIII ..... *passim*

**Other Authorities**

Andrew M. Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*,
85 Mich. L. Rev. 1699 (1987) ..... 16

Anthony Noto, *UPS Vows to Fight $247M Penalty for Shipping Untaxed Cigarettes, New York Business Journal (May 26, 2017)*,
https://www.bizjournals.com/newyork/news/2017/05/26/ups-vows-to-fight-247m-penalty.html ..... 8

## TABLE OF CITED AUTHORITIES
(continued)

Page(s)

Barnini Chakraborty, *Despite Promises to Cut Back, Fed and State Governments Press Asset Forfeitures*, Fox News (Jan. 30, 2018), http://www.foxnews.com /politics/2018/01/30/despite-promises-to-cut-back-fed -and-state-governments-press-asset-forfeitures.html ..... 7

Cesare Bonesana-Beccaria, *An Essay on Crimes and Punishments* (1872 ed.), http://lf-oll.s3.amazonaws.com /titles/2193/Beccaria_1476_Bk.pdf. ..... 16

David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. Rev. & Pol'y 541 (2017).. 7, 8

David J. Stone, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. Rev. 427 (1993) ..... 6

Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35 (1998) ..... 7

## TABLE OF CITED AUTHORITIES
(continued)

Page(s)

Erin Durkin, *Newkirk Plaza Merchants Hit with Fines as de Blasio Pushes City to Ease Up on Small Businesses*, N.Y Daily News , Apr. 25, 2012, http://www.nydailynews.com/new-york/brooklyn/newkirk-plaza-merchants-hit-fines-de-blasio-pushes-city-ease-small-businesses-article-1.1067535 ..... 11

James Madison, House of Representatives (June 8, 1789), http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html.....22

Jessica Dye, *NY Public Advocate Slaps City with Lawsuit over Fines*, Reuters, July 26, 2012 .....10

John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986) .....21

John Terzaken & Pieter Huizing, Allen & Overy, *How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels, Antitrust, Spring 2013*, http://awa2014.concurrences.com/IMG/pdf/how_much.pdf .....13, 14

L. Stuart Ditzen, *Are Punitive Damage Awards Too Punishing?*, Phila. Inquirer, Oct. 29, 1989.....13

## TABLE OF CITED AUTHORITIES
(continued)

*Page(s)*

L. S. Sealy and R J A Hooley, Commercial Law: Text, Cases and Materials (5th ed. 2003) .....14

*Less Punitive Damages*, Wash. Post, July 11, 1989, https://www.highbeam.com/doc/1P2-1200624.html.....12

Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?* 19 U. Pa. Const. L. 1111 (2017).....9, 10, 16, 18

Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. Rev. 395 (1991) ..... 14

Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause,* 40 Hastings Const. L.Q. 833 (2013) .....11, 19, 20, 21

Office of Bill de Blasio, *Report de Blasio: City Budgets Drowning Small Businesses in Frivolous Fines* (Apr. 25, 2012), http://www.maketheroad.org/article.php?ID=2359 .....11

**TABLE OF CITED AUTHORITIES**
**(continued)**

**Page(s)**

Patrick McHenry, *Debate in Virginia Ratifying Convention* (June 16, 1788), http://press-pubs.uchicago.edu/founders/documents/amendVIIIs13.html ..... 18

Robert O. Dawson, *Sentencing Reform: The Current Round Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. by Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis.* New York: Praeger Publishers, 88 Yale L.J. 440 (1978) ..... 5, 6

Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7 (2008) ..... 19-20

United States Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines* (Oct. 2015), http://www.instituteforlegalreform.com/uploads/sites/1/ConstitutionalConstraints_web.pdf ..... 8, 9

United States Chamber Litigation Center, *Grady v. Hunt County, Texas*, http://www.chamberlitigation.com/cases/grady-v-hunt-county-texas ..... 9

**TABLE OF CITED AUTHORITIES**
**(continued)**

**Page(s)**

United States, Small Business Administration, *Small Business Profile: Indiana*, https://www.sba.gov/sites/default/files/advocacy/IN_0.pdf ..... 14

William Rawle, *A View of the Constitution of the United States of America* 125 (1825) ..... 20

## INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing amicus briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in ensuring a fair and predictable legal environment across the United States. Unfortunately, and with increasing frequency, state and local legislatures are authorizing – and executive officials are seeking – excessive fines and forfeitures[2] for relatively modest violations of the law by businesses and individuals. While the Eighth Amendment's Excessive Fines Clause restricts

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than amicus curiae, its members, or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. All parties have received timely notice of amicus curiae's intent to file and consented to the filing of this brief.

[2] Under this Court's Excessive Fines Clause jurisprudence, "[f]orfeitures—payments in kind—are . . . 'fines' if they constitute punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

excessive fines arising under federal law, the lack of a uniform, similar constraint on the governments in the 50 states is needlessly driving up costs for businesses, increasing prices for consumer goods and services, and undermining economic growth.

Petitioner here asks this Court to consider only whether the protection of the federal Excessive Fines Clause of the Eighth Amendment is applicable to the States under the Fourteenth Amendment. State courts, absent clear guidance from this Court, have offered inconsistent answers to this question. The Chamber believes this case presents an ideal vehicle to conclusively resolve the constitutional issue of incorporation.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Succinctly stated, the Eighth Amendment prohibits "excessive sanctions." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (internal quotation marks omitted). In a series of twentieth-century opinions, the Supreme Court held much of the Bill of Rights applicable to the States, including two-thirds of the Eighth Amendment's guarantees against excessiveness. *See Robinson v. California*, 370 U.S. 660, 675 (1962) (prohibiting cruel and unusual punishments); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (prohibiting excessive bail). As to the Eighth Amendment's Excessive Fines Clause, however, this Court's jurisprudence has been unclear. *Compare Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001) (the "Due Process Clause . . . makes the Eighth Amendment's prohibition against

excessive fines . . . applicable to the States"), *with McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 765 n.13 (2010) ("We never have decided whether the . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause"). This case presents an opportunity to remove this important constitutional uncertainty.

The petition here presents a compelling fact pattern that underscores the need for a definitive ruling by this Court. The maximum statutory fine for Petitioner's offense was $10,000, but prosecutors ultimately reached an agreement to resolve the monetary aspects of the case for $1,203 in costs and fees. Pet. at 6-8. Several months later, however, a private law firm moved on behalf of the State for forfeiture of the vehicle used in the commission of the crime: a vehicle worth more than 33 times the fine imposed in the case and 4 times the maximum fine allowed under Indiana law. *Id.* at 7. Although Petitioner's counsel raised an Eighth Amendment defense, the Indiana Supreme Court declined to even review the forfeiture under the federal Excessive Fines Clause "[a]bsent a definitive holding from the Supreme Court" that such a review was required. *Id.* at 9-10.

The disproportionality in this case is not unique. Across the country, state and local prosecutors are targeting large and small businesses for similar treatment. Newspapers and legal literature from the 1980s forward are replete with examples of large fines being handed out for even the smallest of violations – at great cost to businesses and their customers – all because decision-makers have

been persuaded to invoke the "deep-pockets" theory of corporate exposure.

The Petitioner's case – alongside the business-focused examples described in this submission – should be cause for this Court's concern. This Court has long extolled the Framers' motivations in adopting the Eighth Amendment. But in recent decades, many of the same excesses that originally led to the federal constitutional prohibition now present themselves forcefully in states that have not recognized the Clause's incorporation. And often, state and local prosecutors have pursued excessive sanctions for the government's financial benefit, rather than to mete out justice fairly and proportionately to the underlying offense.

The solution to this problem is straightforward. The Founders recognized the judiciary as the last line of defense against overzealous prosecution. This Court should embrace the judicial branch's role in reviewing fines and other monetary sanctions for excessiveness. The Eighth Amendment's Excessive Fines Clause should be held applicable to the States.

## ARGUMENT

### I. THE UNCHECKED PROLIFERATION OF DISPROPORTIONATE FORFEITURES AND REVENUE-SEEKING FINES UNDERMINES ECONOMIC GROWTH.

#### A. Mandatory Forfeitures Are Increasingly Common and Problematic.

Penalty statutes – and in particular here, statutes imposing fines and forfeitures – are often drafted with the worst prospective offender in mind. As commentators have noted, penalty amounts have "tended to be quite high because legislatures have used a 'worst case' mentality in setting them." Robert O. Dawson, *Sentencing Reform: The Current Round Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. by Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis.* New York: Praeger Publishers, 88 Yale L.J. 440, 442 (1978) ("*Sentencing Reform*"). For example, in the early 1970s, Congress passed legislation, including the Racketeer Influenced and Corrupt Organizations Act, which authorized forfeiture of property connected to the criminal enterprise. These laws – and other statutes like them in the years since – were an "'extraordinary' weapon" against those who had significant involvement in organized crime, but they did not take into account the unfairness that such "drastic" measures would have against others with less culpability. *Russello v. United States*, 464 U.S. 16, 27 (1983)).

The responsibility for reviewing fines to ensure that they are not grossly disproportionate to the alleged wrongdoing lies principally with the judiciary. In fact, legislatures rely upon trial judges "to mitigate the severity of punishment in the great majority of cases." Robert O. Dawson, *Sentencing Reform*, 88 Yale L.J. at 442. And a key part of that analysis in many jurisdictions is the Excessive Fines Clause.

Incorporation of this provision would impose a duty on state courts to go beyond whether a fine is authorized under state law and ask whether it is appropriate in the actual circumstances before the court. Without this additional check, the resultant financial penalties can offend basic notions of fairness and add little to deter the ills the legislature was attempting to prevent in the first place.

### B. Governments Are Increasingly Misusing Mandatory Forfeitures and Fines as Revenue Streams Rather Than as a Proportionate Punishment for a Particular Offense.

Fines and related forfeitures are on the rise in America, as are state and local government's reliance on – and abuse of – such enforcement mechanisms. *See, e.g.*, David J. Stone, *The Opportunity of Austin v. United States: Toward A Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. Rev. 427, 429-30 (1993). In 1991, a Justice Department memorandum observed that "state and local law enforcement agencies were becoming increasingly dependent upon equitable sharing of forfeiture

proceeds," with nearly $1.4 billion in assets transferred to the agencies as of 1994. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 64 (1998). By 2017, "[f]orfeitures, particularly civil forfeitures, have become a powerful tool for the Department of Justice, as well as for local law enforcement agencies," with dollar amounts far exceeding total from the 1990s. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as A Check on Government Seizures* ("*Forfeitures*"), 11 Harv. L. & Pol'y Rev. 541, 541–42 (2017).

For their part, local officials now openly boast about their profit-making enterprises and engage contingent fee private attorneys to pursue them. In fact, a "national study found 60 percent of the 1,400 municipal and county agencies surveyed across the country relied on forfeiture profits as a 'necessary' part of their budget." Barnini Chakraborty, *Despite Promises to Cut Back, Fed and State Governments Press Asset Forfeitures*, Fox News (Jan. 30, 2018).[3] Indeed, the Las Cruces, New Mexico city attorney bragged that, through civil forfeitures:

> "We could be czars. We could own the city. We could be in the real estate business." He detailed how police targeted nice vehicles and other

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[3] http://www.foxnews.com/politics/2018/01/30/despite-promises-to-cut-back-fed-and-state-governments-press-asset-forfeitures.html.

> desirable assets, but that they should pursue bigger fish: "This is a gold mine! A gold mine! You can seize a house, not a vehicle!"

David Pimentel, *Forfeitures*, 11 Harv. L. & Pol'y Rev. at 550.

Not only are the fines and forfeitures sought by state and federal governments massive in the aggregate, but the fines on a case-by-case are equally as staggering, sometimes reaching "into the billions of dollars against a single entity." U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines* at 1 (Oct. 2015).[4] For example, the State of New York and the City of New York recently sought $872 million in penalties – and were awarded $247 million – against UPS because a small number of sellers used UPS's services to ship untaxed cigarettes. Anthony Noto, *UPS Vows to Fight $247M Penalty for Shipping Untaxed Cigarettes*, New York Business Journal (May 26, 2017).[5] At the opposite end of the country, Hunt County, Texas hired private attorneys who sought approximately $2 billion in fines from a landowner for improperly storing a pile of wood

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[4] http://www.instituteforlegalreform.com/uploads/sites/1/ConstitutionalConstraints_web.pdf.

[5] https://www.bizjournals.com/newyork/news/2017/05/26/ups-vows-to-fight-247m-penalty.html.

on his property. *See* U.S. Chamber Litigation Ctr., *Grady v. Hunt Cty., Texas*.[6]

Moreover, entities are frequently subject to multiple fines by different government actors for the same conduct. U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines*, at 1. For example, the South Carolina Supreme Court recently upheld a $124 million civil penalty award in a case brought by the South Carolina Attorney General against Johnson & Johnson for the same purported misconduct regarding a drug that was already the subject of the company's $2.2 billion settlement with the federal government. *Id.* at 5. "If the other 49 states followed South Carolina's lead, it would amount to over $6 billion in civil fines on top of the federal government's $2.2 billion settlement." *Id.*

Fines are hurting small businesses, in particular, with the "explosion of civil forfeiture cases [bringing] with it persistent allegations of abuse." Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1120 (2017) ("*Excessive Punishment in Civil Forfeiture*"). For example:

> The CBS television show, 60 Minutes, highlighted the plight of Willie Jones, a

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[6] http://www.chamberlitigation.com/cases/grady-v-hunt-county-texas.

> black landscaper who was stopped at the Nashville airport after being observed paying cash for his airline ticket. Law enforcement authorities detained Mr. Jones and seized $9,000 in cash from his person because, according to police, he matched the profile of a drug courier. In fact, he was traveling to Texas to buy shrubs for his landscaping business and needed cash to do so. Nonetheless, police confiscated his $9,000, and released him without ever charging him with a crime. Mr. Jones sued the government to get his money back and ultimately prevailed, with the presiding judge noting that "the statutory [forfeiture] scheme as well as its administrative implementation provide[d] substantial opportunity for abuse and potentiality for corruption."

*Id.*

In New York City, small businesses "flooded [then-Public Advocate Bill de Blasio's] office with complaints of being hounded for minor offenses and [being] forced to pay 'excessive' fines." Jessica Dye, *NY Public Advocate Slaps City with Lawsuit over Fines*, Reuters (July 26, 2012). With the City's estimated fine revenue doubling from $400 million to $800 million in a ten-year period, de Blasio sought "answers about what this 'fine first, ask questions later' enforcement is doing to our small businesses and their ability to survive in this economy." *Id.* *See*

*also* Erin Durkin, ***Newkirk Plaza Merchants Hit with Fines as de Blasio Pushes City to Ease Up on Small Businesses***, N.Y. Daily News, Apr. 25, 2012.[7] These fines had particularly deleterious effects on New York's "[i]mmigrant entrepreneurs," who found themselves faced with a "harsh enforcement of non-critical violations [that] are creating unnecessary obstacles to small business success." Office of Bill de Blasio, ***Report de Blasio: City Budgets Drowning Small Businesses in Frivolous Fines*** (Apr. 25, 2012), available at http://www.maketheroad.org/article.php?ID=2359.

All of these examples reflect the type of injustice the Eighth Amendment should preclude. "There is good reason to be concerned," Justice Scalia wrote, "that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." ***Harmelin v. Michigan***, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.).[8] "Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a

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[7] http://www.nydailynews.com/new-york/brooklyn/newkirk-plaza-merchants-hit-fines-de-blasio-pushes-city-ease-small-businesses-article-1.1067535.

[8] Indeed, even before adoption of the Fourteenth Amendment, officials recognized the particular destructive power of fines on businesses. In an 1864 speech, Pennsylvania Senator Edgar Cowan argued that in order for fine to be constitutional, it must "save[] . . . to the merchant his merchandise [and] to the villein his wainage." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 884 (2013) (citing Cong. Globe, 38th Cong., 1st Sess. 561 (1864) (statement of Sen. Edgar Cowan)).

source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.*

While a remedy for these problems might lie with state legislatures, they are not always careful guardians of constitutional rights and, in times of budgetary crisis, are often looking for new avenues to raise funds. Such bodies are "overstocked with lawyers" who have little interest in limiting potential sources of revenue for themselves or their private sector colleagues (in the form of assistance with forfeiture proceedings, for example). *Less Punitive Damages*, Wash. Post, July 11, 1989.[9] Moreover, legislators are often politically reluctant to discontinue a funding stream that limits the need for tax increases.

Defendants also cannot always take refuge in state constitutional or statutory prohibitions on excessive fines. Not all states prohibit excessive fines. Moreover, trying to track legal developments and adjust one's business affairs based on fifty different rules for excessive fines is a prohibitively cumbersome jigsaw puzzle for many corporations to solve.

Thus, the only way that the longstanding constitutional principles underlying the Excessive Fines Clause will truly be applied fairly and uniformly

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[9] https://www.highbeam.com/doc/1P2-1200624.html.

to all businesses and individuals across this country is through action by this Court.

### C. Excessive Fines, and the Legal Uncertainty Surrounding Whether They May Be Imposed, Hinder Economic Growth.

While this case comes to the Court in the context of the State imposing a grossly disproportionate sanction on a single individual, Petitioner is not alone in seeking a fair, uniform standard. The business community and its customers are equally affected.

"Over-punishment can . . . lead to over-deterrence, where businesses become too cautious and refrain from undertaking competitive activity because of fear that the activity may be deemed" a violation of law. John Terzaken & Pieter Huizing, Allen & Overy, *How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels*, Antitrust, at 6 Spring 2013 ("*How Much Is Too Much*").[10] When corporations face the prospect of excessive financial penalties, products are "withheld from the market by lawsuit-leery companies," L. Stuart Ditzen, *Are Punitive Damage Awards Too Punishing?*, Phila. Inquirer, Oct. 29, 1989, thereby depriving businesses of profitable opportunities and consumers of the products that they might want to purchase. With over 493,000 small businesses and 1,173,626 employees of such businesses in Indiana

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[10] http://awa2014.concurrences.com/IMG/pdf/how_much.pdf.

alone, *see* U.S. Small Business Admin., *Small Business Profile: Indiana*,[11] for example, even modest risk-based adjustments can have a significant impact.

Consumers are affected in other ways. "Excessive fines, designed to punish corporations, will more likely than not hurt consumers by requiring an excessive increase in prices as well as an excessive diversion of resources to prevention activities." Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. Rev. 395, 402 (1991). Moreover, "excessive fines may lead to insolvency . . . , which in certain markets may significantly weaken competition and ultimately hurt consumers in that market." John Terzaken & Pieter Huizing, *How Much Is Too Much* at 6.

The continuing uncertainty in the legal landscape also takes a toll. Among other things, such uncertainty increases transaction costs, hinders entrepreneurial investment, and deters consumer purchases. Indeed, "[b]usinessmen . . . require the decisions of the courts on commercial issues to be predictable so that they know where they stand." L. S. Sealy and R J A Hooley, *Commercial Law: Text, Cases and Materials* at 10 (5th ed. 2003). This is particularly true here, where businesses may have their goods and services crossing between jurisdictions that recognize the binding effect of the Eighth Amendment and those who do not. As the amount of the excessive fines grows, *see supra* at 6-11, businesses may need to avoid transactions in

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[11] https://www.sba.gov/sites/default/files/advocacy/IN_0.pdf.

jurisdictions where businesses are treated unfairly. Such inefficiencies, caused by legal uncertainty and a patchwork of inconsistent legal regimes, do not serve businesses or consumers well.

## II. EIGHTH AMENDMENT REVIEW OF STATE FORFEITURES AND FINES IS A CONSTITUTIONALLY NECESSARY CHECK ON ABUSIVE FINES AND SHOULD BE MANDATED BY THIS COURT.

With almost no analysis, the Indiana Supreme Court elected not to apply the federal Excessive Fines Clause here because "the federal government itself has not mandated" this result. *State v. Timbs*, 84 N.E.3d 1179, 1183–84 (Ind. 2017). But the Excessive Fines Clause is precisely the type of constitutional provision that should be incorporated. Allowing Indiana's decision to stand only emboldens other jurisdictions to reject long-established principle and precedent.

### A. The Excessive Fines Clause Is Precisely the Type of Constitutional Provision That Should Be Incorporated.

Individual components of the Bill of Rights are incorporated against the States where a provision is "fundamental to *our* scheme of ordered liberty" or where the right is "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (citation omitted); *see also Cantwell v. State of*

*Connecticut*, 310 U.S. 296, 303 (1940). Both are true here.

It is a basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In fact, this "enduring principle" was long ago embedded into the Magna Carta, Andrew M. Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1716 (1987), and reaffirmed by key thought leaders during The Enlightenment. While the "sovereign's right to punish crimes is founded . . . upon the necessity of defending the public liberty," Cesare Bonesana-Beccaria wrote in his quintessential work on crime, the "punishments [must be] just in proportion as the liberty, preserved by the sovereign, is sacred and valuable." Cesare Bonesana-Beccaria, *An Essay on Crimes and Punishments*, at 17 (1872 ed.).[12]

The Founders understood the lessons of past eras, when these principles were not resolutely entrenched into the law. As a result, a "primary focus" of their efforts in drafting the Constitution and Bill of

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[12] http://lf-oll.s3.amazonaws.com/titles/2193/Beccaria_1476_Bk.pdf. Notably, "Beccaria's writings materially informed the Founding Fathers' attitudes and views of the provisions of the federal Bill of Rights." *Louis S. Rulli, Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1115 n.2 (internal quotations and brackets omitted) ("*Excessive Punishment in Civil Forfeiture*").

Rights "was the potential for governmental abuse of its 'prosecutorial' power." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989). Based on past experiences, the Founders wanted a clear limit on "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* at 267. Among other models, the Founders turned to the English Bill of Rights of 1689, which was designed "to curb the excesses of [17th century] English judges" who were imposing "partisan" and "heavy fines on the King's enemies." *Id.*

But the Founders "feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured." *Ingraham v. Wright*, 430 U.S. 651, 665 (1977). Indeed, their "principal concern . . . appears to have been with the legislative definition of crimes and punishments." *Id.*

Against this general background, the Framers of the Bill of Rights began work on the Constitution's Eighth Amendment. Its text provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Amendment's language was taken, "almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the [aforementioned] English Bill of Rights of 1689." *Ingraham*, 430 U.S. at 664.

While Congress did not debate the Eighth Amendment's language directly to any meaningful

extent in 1791, *see Browning-Ferris*, 492 U.S. at 264, contemporary advocates spoke out and wrote approvingly about its principles. For example, during the original Virginia Ratifying Convention in 1788, Patrick McHenry argued that it would "depart from the genius of your country" to adopt a Constitution without a restriction on excessive fines. Patrick McHenry, *Debate in Virginia Ratifying Convention*, (June 16, 1788).[13] "[W]hen we come to punishments," McHenry continued, "no latitude ought to be left [to legislatures to] define . . . punishments without this control." *Id.* A prominent pre-ratification author likewise linked the importance of placing excessiveness-related constraints on both the federal and state governments:

> For the security of liberty it has been declared, "that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. . . ." These provisions are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, . . . and seizing . . . property . . . as the other.

Louis S. Rulli, *Excessive Punishment in Civil Forfeiture*, 19 U. Pa. J. Const. L. at 1115 (quoting

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[13] http://press-pubs.uchicago.edu/founders/documents/amendVIIIs13.html.

Brutus II (Nov. 1, 1787), as reprinted in *The Complete Bill of Rights* 621 (Neil H. Cogan, ed., 1997)).

Given this "traditional understanding of protection from excessive fines as inherent in English fundamental law, and in light of the fact that protections against excessive fines are among the most ancient rights of the Anglo-American legal tradition, it can scarcely be argued that such rights are not 'deeply rooted in this Nation's history and tradition.'" Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 875 (2013) (citation omitted); *see also Klopfer v. State of North Carolina*, 386 U.S. 213, 223–24 (1967) (incorporating right that "has its roots at the very foundation of our English law heritage"); *Solem v. Helm*, 463 U.S. 277, 284–88 (1983) (observing that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century").

Historic support for incorporation is also quantifiable. By 1791, the constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia all contained prohibitions on excessive fines, as did the Northwest Ordinance of 1787. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. at 876. And by the year the Fourteenth Amendment was adopted, 35 states – accounting for nearly 92% of the population – had incorporated their own version of an excessive fines prohibition into their constitutions. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the*

*Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 82 (2008).[14]

This is why, as Petitioner details (at 13-18 & n.5), many state and federal courts have concluded that it is "beyond serious dispute" that the Excessive Fines Clause applies to the States – particularly so given this Court's past statements to this effect. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (explaining that the entirety of the Eighth Amendment "is applicable to the States through the Fourteenth Amendment");[15] Pet. at 10, 21-23 & n.6. Yet because courts in a handful of states (*e.g.*, Michigan, Mississippi, and Montana), *id.* at 19-21, and federal jurisdictions, *see, e.g.*, *Garcia v. Wyoming*, 587 F. App'x 464, 469 (10th Cir. 2014), have concluded that the Excessive Fines Clause does not apply to the States, a definitive statement from this Court is the only way to end the "surprising amount of confusion"

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[14] In fact, prior to the Fourteenth Amendment, one prominent author had even argued for applying the Eighth Amendment's ban on excessive fines to the States of its own force. In his 1825 treatise, William Rawle wrote that the prohibition on excessive fines was "founded on the plainest principles of justice, and alike obligatory on the legislatures and judiciary tribunals of the states and of the United States." Nicholas M. McLean, *supra* n.8, at 901 (quoting William Rawle, *A View of the Constitution of the United States of America* 125 (1825)).

[15] *See also Miller v. Alabama*, 567 U.S. 460, 503 (2012) (Thomas, J., dissenting) ("The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, provides that: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'") (citation omitted).

that now exists, *Reyes v. N. Texas Tollway Auth.*, 830 F. Supp. 2d 194, 206 (N.D. Tex. 2011).[16]

Finally, lest there be any doubt, courts are more than capable of making these determinations. A hallmark of the American constitutional system is the creation of "an independent judiciary [as] the ultimate reliance of citizens in safeguarding rights guaranteed by the Constitution" over and beyond the legislative and executive branches. *Levine v. United States*, 362 U.S. 610, 616 (1960).[17] This Court long ago recognized

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[16] There is a similar level of confusion among the scholarly community. *Compare* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147–48 (1986) (explaining that because "the disapproval of excessive fines is logically intertwined with the other two provisions of the [E]ighth [A]mendment, its applicability to the states seems clear"), *with* Nicholas M. McLean, *supra* note 8, at 875 ("it remains somewhat unclear whether the Supreme Court has in fact incorporated the Excessive Fines Clause to date.").

[17] Indeed, James Madison recognized that adoption of the Bill of Rights would bolster the role of the federal judiciary. He explained:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

"the duty of the courts to adjudge such penalties to be within the constitutional prohibition" of the Eighth Amendment. *In re Kemmler*, 136 U.S. 436, 446 (1890). In fact, "by broadly prohibiting excessive sanctions, the Eighth Amendment [actually] directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment." *Ewing v. California*, 538 U.S. 11, 32–35 (2003) (Stevens, J., dissenting).

In short, ample authority supports reversing the Indiana Supreme Court's decision, confirming that the Eighth Amendment applies to the States, and vesting the judicial branch with authority to apply the same uniform, centuries-old principles of fairness and proportionality that are applied to cases arising under federal law. *See Bajakajian*, 524 U.S. at 334-44.

### B. Granting Certiorari Will Prevent Indiana, and Other States, from Ignoring an Essential Element of Ordered Liberty.

"The purpose of the Eighth Amendment . . . was to limit the government's power to punish," with the Excessive Fines Clause forming an integral part of the Amendment's three-part framework by "limit[ing] the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993)

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James Madison, House of Representatives, (June 8, 1789), available at http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html.

(quoting *Browning-Ferris*, 492 U.S. at 265). It "would be anomalous indeed" if other sanctions under the Eighth Amendment were subject to review under federal constitutional principles but excessive fines were not. *Solem*, 463 U.S. at 289.

In today's world, state and local prosecutors have sought to extract grossly disproportionate fines from those parties – like corporations – who presumably have the resources to pay, rather than seeking more appropriate sanctions. But such schemes, which leave prosecutors unbound to fundamental constitutional principles of proportionality, defeat the broader goals behind the Eighth Amendment and this Court's decision to incorporate its other clauses against the States. This Court should not allow overzealous prosecutors and contingent fee counsel to effectively do away with fundamental constitutional rights.

## CONCLUSION

Today the imperative for incorporating the Excessive Fines Clause against the States could scarcely be more clear. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). With excessive fines on the rise, and confusion and uncertainty reigning in the legal community, this case presents the Court with an opportunity to resolve an important constitutional issue and protect all Americans' fundamental right to liberty.

This Court should grant the petition.

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